IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE

WRIT PETITION NO.1404 OF 2006

M/s.Siddhivinayak Construction Co. & Ors. ...Petitioners.
Vs.
Durgabai Bhaskar Mhatre & Ors. ...Respondents.
....
Mr. N. V. Walawalkar with Mr.Rajan K. Kakkara for the Petitioners.
Mr. Mahendra Bajpai for Respondent Nos.1 to 3.
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CORAM : DR.D.Y.CHANDRACHUD, J.

June 6, 2006.

P.C.

Rule, by consent of Counsel returnable forthwith. Counsel appearing on behalf of the Respondents waives service. By consent of Counsel and at the request of Counsel taken up for hearing.

2. Respondent Nos.1 to 9 are the Plaintiffs in L.C. Suit No.1084 of 2004 instituted against the Petitioner and the Municipal Corporation for Greater Mumbai for a declaration and for injunctive relief. The Respondents claimed that the predecessor-in-interest was a cultivator of the suit property on tiller's day and that he was a protected tenant under the Bombay Tenancy and Agricultural

Lands Act, 1948. Hence, it has been submitted that the property would not come within the purview of the Maharashtra Slum Areas (Improvement, Clearance and Redevelopment) Act, 1971. The Petitioners were served with a writ of summons on 20th March 2004. An affidavit in reply to the Motion for interim relief was filed on 1st April 2004. The Petitioners raised a defence to the effect that the subject matter of the suit lies outside the pecuniary jurisdiction of the City Civil Court and challenged the maintainability of the suit on the ground that it was barred by limitation. On 20th August 2004, the Trial Judge framed two preliminary issues relating to pecuniary jurisdiction and to the question of limitation. An order was passed by the Trial Court holding that the preliminary issues raised mixed questions of law and fact. The order was challenged in a Civil Revision Application. In the meantime, the Motion was taken up for hearing and final disposal and was adjourned from time to time. According to the Petitioners, the Motion was finally adjourned to 5th March 2005. In the meantime, the matter appeared on Board on 4th March 2005. On that day, the Learned Judge observed that the suit would proceed against Defendant Nos.2 to 4 for want of a Written Statement. An oral application was moved before the Trial Court, followed by a written application on

7th April 2005 for taking the Written Statement on record. The Trial Judge declined to do so by an order dated 15th April 2005. The Civil Revision Application was disposed of by this Court on 30th August 2005 holding that the Trial Judge has correctly come to the conclusion that the preliminary issues raised mixed question of law and fact and would, therefore, be considered at an appropriate stage.

3. In these proceedings the order of the Trial Judge dated 15th April 2005 declining to take the Written Statement on record has been challenged.

4. In **Shaikh Salim Haji Abdul Khayumsab v. Kumar,** 2006(1) Bom. C.R. 57, the Supreme Court construed the effect of the amendment brought about to Order 8 Rule 1 of the Code of Civil Procedure, 1908 by virtue of the Amending Act, with effect from 1st July 2002. Order 8 Rule 1 provides that a Written Statement has to be filed within a period of 30 days from the date of service of summons but where the defendant fails to do so, he shall be allowed to file the Written Statement on such other day, as may be specified by the Court for reasons recorded in writing,

but which shall not be later than ninety days from the date of service of summons. The Supreme Court held that all rules of procedure are handmaids of justice and the provisions of Order 8 Rule 1, therefore, are not such as would exclude the power of the Court to pass an appropriate order to meet the ends of justice.

5. The facts in the present case would show that the Petitioners entered appearance and contested the motion for interim relief inter alia by objecting to the jurisdiction of the Trial Court. The issue as regards the maintainability of the suit has not been decided by the Learned Trial Judge. The Learned Trial Judge held that this issue would be tried not as a preliminary issue, but at the trial since evidence would be required to be adduced, inasmuch as it raised mixed questions of law and fact. The Learned Trial Judge, it may be noted, condoned the delay on the part of the Municipal Corporation in filing the Written Statement and the Written Statement of the Corporation was taken on record.

6. Having regard to the aforesaid background of the case, and the proceedings which have ensued between the parties, I am of the view that the ends of justice require permitting the Petitioners

to file their Written Statement. Counsel states that the Written Statement would be filed immediately. It would appear that the Written Statement has been marked for identification. However, this is a case where an order of costs ought to be made against the Petitioners to provide just recompense to the Respondents. The Petition is accordingly disposed of, quashing and setting aside the impugned order of the Trial Court dated 15th April 2005. The Written Statement of the Petitioners shall be taken on record subject to the payment of costs to the Plaintiffs quantified at Rs.10,000/-. Costs to be paid within two weeks from today and shall be a condition precedent. The Petition is accordingly disposed of.

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